132-41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~887~~ 113

THE RIO GRANDE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

P. S. WILTZ, JR., DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 2, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 387.

THE RIO GRANDE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

P. S. WILTZ, JR., DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 8, 1889.

a UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA & CO. } No. 10628.

Transcript of Record.

Geo. L. Bright, for plaintiff in error.
Breaux and Hall, for defendants in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, 1886.

1 *Rule to Stop Sale. Entered & Filed Mar. 5th,* 1885.

Circuit Court of the United States for the 5th Circuit & East. Dist. of La.

RIO GRANDE R. R. COMPANY
vs.
GOMILLA & Co. } No. 10628.

On motion of Breaux & Hall, attorneys for P. S. Wiltz, Jr., dative testamentary executor of the estate of A. J. Gomila, deceased, & in his said capacity made a party defendant herein, and upon suggesting to the court that the plaintiff herein is attempting to sell, & the marshal of this district has advertised for sale on the 5th day of Nov., 1885, the certain assets & property hereinafter described, under writs of *fieri facias* issued herein prior to the death of said Gomilla, viz., the claim made by Gomilla & Co. against Culliford & Clark in suit No. 10965 of the dist. court of the U. S. for the eastern district of Louisiana, judgments rendered in said cause in said dist. court & in this circuit court; also the judgments rendered in the civil dist. court for the parish of Orleans in the suit of Gomila & Co. *vs.* John F. Milliken—Kehlor Bros., garnishees—No. 7967 of the docket thereof, and upon further showing to the court that
2 an undivided three-fourths interest in & to said assets & property belonging to and is inventoried as the — of said succession, subject to att'y's fees of 50 % & subject to the lien of the seizing creditor herein, Rio Grande R. R. Co.; that said assets & property are in the due course of administration by said probate court & this mover, as said dative testamentary executor; that said succession is insolvent & it is necessary that the property & assets thereof, including said assets, should be administered in the probate proceedings, as is provided by law, in that the debts & obligations of said succession may be liquidated & paid in the order & manner specially required by law; and further showing that this honorable

court is without jurisdiction or legal authority to administer upon the effects, assets, or property of said succession, or to order the sale of any portion thereof, or to proceed with the said advertisement & sale aforesaid; that said attempted sale is illegal & improper interference with the administration of said succession & a violation of the legal rights & privileges of mover & the creditors of said
3 succession, & said sale is wholly unauthorized in law & will be null & void if made *as if made* as advertised:

This mover thereupon moves the court to forthwith order the said marshal of this district to discontinue & withdraw the said advertisement of sale & to desist from making said sale & not to sell or offer for sale said assets & property so advertised as aforesaid.

Nov. 4, '85.

(Signed) BREAUX & HALL, *Att'ys.*

Entered and filed Nov. 5, 1885.

T. McC. HYMAN,
D'y Clerk.

4 *Exception and Answer to Motion of P. S. Wiltz, Dat. Test'y Exe't'r.*

Circuit Court of the United States for the 5th Circuit and Eastern Dist. of La.

RIO GRANDE R. R. Co.
vs.
GOMILLA & Co. } No. 10628.

Now come into court the Rio Grande Railroad Company, and to the motion herein, made on this 5th day of Nov., 1885, by P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, deceased, for an order to the marshal of this district "to discontinue and withdraw the advertisement of sale of the property described in the motion, and to desist from making said sale and not to sell or offer for sale said assets and property so advertised as aforesaid;" and these appearers except and demur to said motion, and for cause allege and show—

1. That the mover, P. S. Weltz, dative testamentary executor, if he has any cause of complaint, as set forth in his said motion, which is denied, *he* cannot present the same to the court by an *ex*
5 *parte* motion and in the manner and form attempted, but must do so by an original proceeding, bill in equity, and injunction.

2. That the motion presents issues of fact and law which, if within the jurisdiction of the law side of this court, should be tried in the ordinary way and by trial by jury.

3. The allegation- made in the rule are vague and indefinite and set forth no cause of action.

Should this demurrer and exception be overruled, and not otherwise, and these appearers ordered to proceed on the trial of the motion, then and not otherwise, and specially reserving the benefit of

their demurrer and exception, for answer to said motion allege and show—

That on the — day of January, 1885, they obtained a judgment in their favor and against Gomilla & Co. and Anthony J. Gomilla and Larney Torrey *in solido* for $26,731.97, and interest thereon at 5 % per annum from 1st January, 1884, until paid, and costs, rendered by this court.

6 That on the —— they issued an execution of said judgment, and by virtue thereof the marshal of this court seized a certain claim made by Gomilla & Co. against Culliford and Clark, in suit No. 10965 of the district court of the United States for the eastern district of La., and the judgment rendered in said suit against Culliford & Clark and others for $9,360.97 and interest and costs, which judgment was appealed to the circuit court of the United States for the 5th circuit and eastern district of La.

On the appeal the circuit court rendered judgment against Culliford & Clark and others on — February, 1885, for $23,999.76, with 5 per cent. interest from 30th June, 1883, till paid, and costs.

From that judgment Culliford and Clark and others appealed to the Supreme Court of the United States, and the appeal is there pending.

The claim of Gomila & Co. against Culliford & Clark and others is for $24,559.76, with interest, at 5 per cent. per annum, from

7 July 9th, 1883, until paid, and costs, and is fully set forth in the libel filed in the suit of Gomila & Co. *vs.* Culliford & Clark, No. 10965 of the United States district court for the eastern district of La.

And they also seized the judgment rendered on the 27th day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomilla & Co. and against John T. Milliken for $6,200, with interest thereon, at the rate of 8 per cent. per annum, from 27 of February, 1883, until paid, and costs of suit, with special lien and privilege on all the property, credits, rights, and money attached.

And they also seized the claim made by Gomila & Co. against Kehlor Bros., garnishees in the suit of Gomila & Co. *vs.* John T. Milliken, No. 7967 of the civil district court for the parish of Orleans. The claim made is for $6,200, interest and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishee-, in the suit of Gomila &

8 Co. *vs.* John T. Milliken—Kehlor Bros., garnishees—No. 7967 of the docket of said court, for $4,442.17, with interest, at 5 per cent. per annum, from June 8th, 1883, until paid, and costs, which judgment was rendered on 10th March, 1885, and was signed on 23d March, 1885.

On the 27th January, 1885, the defendants, Gomila & Co., took a rule on these appearers, The Rio Grande Railroad Company, to show ause why the seizure of the claim of Gomila & Co. against Culli-ord & Clark should not be quashed and set aside.

The rule was tried, and this court dismissed the rule and decreed hat the seizure made by the Rio Grande R. R. Company of the

claim of Gomilla & Co. against Culliford & Clark and others of the judgments rendered in favor of Gomilla & Co. against Culliford & Clark and others are good and valid seizures, and maintained the seizures.

And these appearers show that subsequently, by virtue of the original writ of execution & of the *alias* writ of execution, the marshal of this court advertised the property seized as aforesaid for sale.

9 But before the day fixed for the appraisement of said properties and before the day of sale A. J. Gomila, one of the defendants in execution, died, and in consequence thereof the advertisement was discontinued and the sale stayed.

That subsequently, to wit, on the 10th October, 1885, upon a proper showing by petition, that hon. court ordered as follows:

"Let Mrs. Widow —— Gomila, widow in community with her deceased husband, A. J. Gomila, and natural tutrix of her minor children, and P. S. Wiltz, Jr., public administrator and dative testamentary executor of the last will and testament of A. J. Gomila, be, and are hereby, made parties to these proceedings, and specially for the purpose of enabling the petitioners to proceed under their writ of execution to advertize & sell the property by them seized and as prayed for, and let notice of this order be given to said parties by serving copies thereof on them.

October 10th, 1885.

(Signed) DON A. PARDEE, *Judge.*"

10 They show that — 16th Oct., 1885, a copy of this order was served on Mrs. Gomila, and on the 15th Oct., 1885, a copy was served on P. S. Wiltz; P. S. Wiltz, pub. adm'r, &c.

That subsequently the aforesaid properties were readvertized for sale——

United States Marshal's Sale.

In the United States Circuit Court for the Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY *vs.* GOMILA & CO. } No. 10628.

By virtue of a writ of *fi. fa.* to me directed in the above-entitled suit, I will proceed to sell to the highest bidder, on Wednesday, the 16th day of September, 1885, at 12 o'clock m., at the main entrance to the custom-house, on Canal street, in New Orleans, the following-described property, viz:

The claim made by Gomila & Co. against Culliford & Clarke, in suit No. 10965 of the district court of the United States for the eastern district of Louisiana, and the judgment rendered in said suit against Culliford & Clarke and others for $9,360.97 and interest and

costs, which judgment was appealed to the circuit court of the United States for the fifth circuit and eastern district of Louisiana. On the appeal the circuit court rendered judgment against Culliford & Clarke and others on the 19th February, 1885, for $23,993.76, with 5 per cent. interest from 30th June, 1883, till paid, and costs. From this judgment Culliford & Clarke and others appealed to the Supreme Court of the United States, and the appeal is there pending.

The claim of Gomila & Co. against Culliford & Clarke and others is for $24,559.76, with interest at, 5 per cent. per annum, from July 9, 1883, until paid, and costs, and is fully set forth in the libel filed in the suit of Gomila & Co. *vs.* Culliford & Clarke, No. 10965 of the United States district court for the eastern district of Louisiana.

Seized in the above suit.

Terms cash.

United States marshal's office, New Orleans, 29th day of August, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

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By United States marshal.

United States Marshal's Sale.

In the United States Circuit Court for the Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

By virtue of a writ of *alias fi. fa.* to me directed in the above-entitled suit, I will proceed to sell to the highest bidder, on Monday, the twenty-first day of September, 1885, at 12 o'clock m., at the main entrance to the custom-house, on Canal street, in New Orleans, the following-described property, viz:

1. The judgment rendered on the 27th day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against John T. Milliken for $6,200, with interest thereon, at the rate of 8 per cent. per annum, from 27th February, 1883, until paid, and costs of suit, with special lien and privilege on all of the property, credits, rights, and money attached.

2. The claim made by Gomila & Co. against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken, No. 7967 of the civil district court for the parish of Orleans. The claim made is for $6,200, interest and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken—Kehlor Bros., garnishees—No. 7967 of the docket of said court, for $4,442.17, with interest, at 5 per cent. per annum, from June

8, 1883, until paid, and costs; which judgment was rendered on 10th March, 1885, and was signed on the 23d March, 1885.

Seized in the above suit.

Terms cash.

United States marshal's office, New Orleans, 9th day of September, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

s9 12 16 21

United — Marshal's Sale.

In the United States District Court, Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

By virtue of two writs of *fieri facias* (an original and *alias fi. fa.*) to me directed in the above-entitled suit, I will proceed to sell
11 to the highest bidder, on Thursday, the fifth day of November, 1885, at 12 o'clock m., at the main entrance to the custom-house, on Canal street, in New Orleans, the following-described property, viz:

1. Under the original *fi. fa.:*

The claim made — Gomila & Co. against Culliford & Clarke, in suit No. 10965 of the district court of the United States for the eastern district of Louisiana, and the judgment rendered in said suit against Culliford & Clarke and others for $9,360.97 and interest and costs, which judgment was appealed to *to* the circuit court of the United States for the fifth circuit and eastern district of Louisiana. On the appeal the circuit court rendered judgment against Culliford & Clarke and others on the 19th February, 1885, for $23,993.76, with 5 per cent. interest from 30th June, 1883, till paid, and costs. From this judgment Culliford & Clarke and others appealed to the Supreme Court of the United States, and the appeal is there pending.

12 The claim of Gomila & Co. against Culliford & Clarke and others for $24,559.76, with interest, at 5 per cent. per annum, from July 9, 1883, until paid, and costs, and is fully set forth in the libel filed in the suit of Gomila & Co. *vs.* Culliford & Clarke, No. 10965 of the United States district court for the eastern district of Louisiana.

2. Under the *alias fi. fa.:*

1. The judgment rendered on the 27th day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against John T. Milliken for $6,200, with interest thereon, at the rate of 8 per cent. per annum, from 27th of February, 1883, until paid, and costs of suit, with special lien and privileges on all the property, credits, rights, and money attached.

2. The claim made by Gomila & Co. against Kehlor Bros., gar-

nishees, in the suit of Gomila & Co. *vs.* John T. Milliken, No. 7967 of the civil district court for the parish of Orleans. The claim made is for $6,200, interest and costs; also the judgment
13 rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishee-, in the suit of Gomila & Co. *vs.* John T. Milliken—Kehlor Bros., garnishees—No. 7967 of the docket of said court, for $4,442.17, with interest, at 5 per cent. per annum, from June 8th, 1883, until paid, and costs; which judgment was rendered on 10th March, 1885, and was signed on the 23d March, 1885.

Seized in the above suit.

Terms cash.

United States marshal's office, New Orleans, 19th day of October, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

14 —by marshal to be sold on the 5 Nov., 1885, at 12 o'clock m.

In order to set forth more fully the allegations herein made, these appearers make a part hereof and they annex—

1st. The judgment rendered in their favor against Gomila & Co.

2. The original execution, and the notices given by the marshal, and the process verbal of his proceedings under said writ.

3. The *alias* writ of execution, and the notices given by the marshal, and the process verbal of his proceedings under said writ.

4. The rule taken by Gomila & Co. on the 27 Jan'y, 1885.

5. The decision of the court on said rule.

6. The advertisements of the marshal of the properties seized, three in number.

7. The petition of the Rio Grande Railroad Company making the representatives of A. Gomila parties and the order of court thereon.

These appearers show that the value of the property seized
15 by them and advertised for sale exceeds the sum of ten thousand dollars, and, should the court grant the motion, they will be damaged in an amount exceeding ten thousand dollars, and they specially deny all the facts stated in the motion not herein specially admitted.

The premises considered, these appearers pray that this hon. court will refuse to grant the motion made by the said P. S. Wiltz, dative testamentary executor.

And they pray for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for the Rio Grande Railroad Company.

Filed 5th Nov., 1885.

(Signed) T. McC. HYMAN, *Clerk.*

16 *Decree Overruling, Exception, &c., and Staying Sale, etc. Filed 5 Nov.*, 1885.

United States Circuit Court, 5th Circuit & Eastern Dist. of La.

RIO GRANDE R. R. Co.
vs.
A. J. GOMILA & Co. } No. 10628.

This cause came on to be heard on the application of P. S. Wiltz, Jr., testamentary executor of the succession of A. J. Gomila, to stay the sale of assets herein advertised and belonging to said succession—Breaux & Hall, for mover; G. L. Bright, for Rio Grande R. R. Co., defendant in rule—when, after hearing pleadings and evidence and argument of counsel, it is ordered that the exception & demurrer of said Rio Grande R. R. Co. be overruled, and that the marshal discontinue and withdraw the advertisement of sale herein fixed for this day and desist from making said sale until further order of this court, reserving to the parties all their rights not herein passed upon.

New Orleans, Nov. 5th, 1885.

(Signed) ALECK BOARMAN, *Judge.*

17 *Motion for a Rehearing & a New Trial of the Motion of P. S. Wiltz, Dative Testamentary Executor. Entered & Filed 7th Nov.*, 1885.

United States Circuit Court for the Eastern District of La.

THE RIO GRANDE RAILROAD COMPANY
v.
GOMILA & Co. } No. 10628.

On motion of George L. Bright, attorney for the Rio Grande Railroad Company, it is ordered that P. S. Wiltz, Jr., dative testamentary executor, &c., and plaintiff in the motion herein made, show cause, on Wednesday, Nov. 11, 1885, at 11 a. m., why the order herein made on 5th Nov., 1885, overruling the exception and demurrer of the Rio Grande Railroad Company and ordering the marshal "to discontinue and withdraw the advertisement herein fixed for this day (Nov. 5) and desist from making said sale until the further order of this court, reserving to the parties all their right not herein
18 passed upon," should not be set aside and annulled *and annulled* and a rehearing granted, and why the exception and demurrer filed should not be maintained and the motion refused on the grounds—

1st. The court erred in overruling the exception and demurrer.

2d. The plaintiffs have the right to sell the property advertized, because it was seized and advertized for sale before the death of Gomila and his representatives were made parties after his death; because the right to seize and to hold under seizure necessarily

gives the right to sell; because the property was seized as the partnership property of Gomila & Co.

3d. Because P. S. Wiltz, dative testamentary executor, pretends to represent only an interest in the property seized, and the court stayed the sale of all the property seized.

4. Because the court made the order until the further order of the court to stay the sale advertised for that day, and the order
19 should now be set aside, and there is no issue for any future trial and order.

5. Because the order says "after hearing pleadings and evidence," when in fact the motion was heard on the pleadings and argument and no evidence was received.

6. Because there is no cause of complaint in the matter.

Marshal's Return.

Received by the U. S. marshal Nov. 9th, 1885, and on the 11th day of November, 1885, I served a true copy of within motion for new trial on the defendants, Gomila & Co., by handing the same to P. S. Wiltz, Jr., public administrator, dative testamentary, &c., in person (sick in bed), at his domicil, No. 45½ Louisa street, in the city of New Orleans, and leaving the same in his hands.

Returned same day.

(Signed) R. B. PLEASANTS,
U. S. Marshal,
By JNO. BAKER,
Dep'ty U. S. Marshal.

20 *Rule Submitted.*

Extract from Minutes of Nov. 11th, 1885.

U. S. Circuit Court, Eastern District of La.

RIO GRANDE R. R. Co.
vs.
GOMILA & Co. } No. 10628.

This cause came on to be heard on the motion of the plaintiffs, The Rio Grande Railroad Co., to set aside and annul the order herein entered on the 5th day of November, 1885, and to grant a rehearing; and, after hearing argument of counsel, Geo. L. Bright, Esq., appearing for movers, Breaux & Hall for P. S. Wiltz, Jr., dative testamentary executrix, etc., the matter was submitted, when the court took time to advise.

21 *Ans. of Executor and Prayer for Property. Filed Nov. 11th,* 1885.

U. S. Circuit Court, Eastern District of La.

RIO GRANDE R. R. Co. *vs* GOMILA & Co. } No. 10628.

And now into court comes P. S. Wiltz, Jr., dative testamentary executor of the succession of A. J. Gomila (No. 15196, civil district court for the parish of Orleans), and, for answer to plaintiff'- petition of Oct. 15, 1885, and the order thereon making this appearer a party to this proceeding for the purpose of enabling the said plaintiff to proceed under the writ of execution & to advertise & sell the property & effects therein seized, with respects shows—

That said Gomila departed this life on the — day of Sept., 1885, & his succession was duly opened in the said civil district court, having exclusive probate jurisdiction in this parish; that this appearer was duly appointed by said court & has qualified as dative testamentary executor of said Gomila & his succession, & that, acting under the orders of said court, he has caused to be made

22 an inventory by Geo. C. Preot, notary, of the property & effects of said succession, which inventory, filed Nov. 5, 1885, herewith exhibits as part of the appearance; that among the property & effects aforesaid belonging to said succession are—

1st. A certain portion of ground & improvements in the 6th district of this city, bounded by St. Charles St., St. Patrick St., Edmund (Calhoun) St., and Henry Clay avenue, designated by the letter "A" in a sketch by J. A. De Hemecourt, d'y city surveyor, July 9th, 1872, & accordingly to which sketch said portion of ground measures, Am. measure, 169 ft. front on St. Charles St., 156 ft. 3 in. front on St. Patrick St., by 366 ft. 5 in. 4 lines in depth & front on Henry Clay avenue & 325 ft. 9 in. 1 line in depth in the line which divides it from the lot B, all of which more fully appears by reference to said inventory, wherein said property is properly appraised at $11,800.

2d. And undivided ¾ interest & ownership in & to the following claims & judgments, to wit:

23 The claim made by Gomilla & Co. against Culliford & Clarke, in suit No. 10965 of the district court of the United States for the eastern district of Louisiana, and the judgment rendered in said suit against Culliford & Clarke and others for $9,360.97 and interest and costs, which judgment was appealed to the circuit court of the United States for the fifth circuit and eastern district of Louisiana. On the appeal the circuit court rendered judgment against Culliford & Clarke & others on the 19th February, 1885, for $23,993.76, with 5 per cent. interest from 30th of June, 1883, until paid, and costs. From this judgment Culliford & Clarke and others appealed to the Supreme Court of the United States, and the appeal is there pending.

The claim of Gomila & Co. against Culliford & Clarke and others

is for $24,559.76, with interest, at 5 per cent. per annum, from July 9th, 1883, until paid, and costs, and is fully set forth in the
24 libel filed in the suit of Gomila & Co. *vs.* Culliford & Clarke, No. 10965 of the United States district court for the eastern district of Louisiana.

2. Under the *alias fi. fa.:*

1. The judgments rendered on the 27th day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against John T. Milliken for $6,200, with interest thereon, at the rate of 8 per cent. per annum, from 27th February, 1883, until paid, and costs of suit, with special lien and privilege on all the property, credits, rights, and money attached.

2. The claim made by Gomilla & Co. against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken, No 7967 of the civil district court for the parish of Orleans. The claim made is for $6,200, interest and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Miliken—Kehlor Bros.—garnishees, No. 7967 of the docket
25 of said court, for $4,442.17, with interest, at 5 per cent. per annum, from June 8th, 1883, until paid, and costs, which judgment was rendered on 10th March, 1885, and was signed on the 23d March, 1885.

Now, appearers avers that at the death of said Gomila said property & effects were under seizure herein & constructively in the possession & custody of the marshal & of this hon. court; but that the effect of said death and the opening of the insolvent succession of said Gomila was to *ipso facto* divest this court of its jurisdiction aforesaid, and to transmit in the intendment of law the said property & effects burdened with all the liens to which at the time of said death they were subjected to the said probate court for due and proper administration.

And now this appearer, suggesting the said want of jurisdiction in this court, prays that the Rio Grande R. R. Co., by its counsel, G. L. Bright, Esq., and the marshal of this court be ruled into
26 court on Saturday, the 21st day of November, at 11 a. m., to show cause, if any they have, why said effects & property should not be delivered to this appearer as the officer of the probate court aforesaid, the said property to pass into his possession burdened with any liens in favor of plaintiff which may have resulted from its seizures herein, and to be received and held by said appearer, the executor of Gomila succession, for the purposes of administration under the orders of said probate court; and appearer prays that it may be so ordered, and for general relief.

Nov. 10, '85.

(Signed) BREAUX & HALL,
Of Counsel.

Marshal'- Return.

Received Nov. 12th, 1885, by the U. S. marshal, and on the 13th day of Nov., '85, I served a true copy of the within rules & orders

on G. L. Bright, Esq., att'y for plaintiff, *of* handing the same to him in person.

(Signed) JOHN BAKER,
Dep'ty U. S. Marshal.

& on behalf of the U. S. marshal service hereof is accepted, copy being furnished.

(Signed) R. B. PLEASANTS,
U. S. Marshal,
By JNO. E. LIVEAUDAIS,
D'y U. S. Marshal.

27 *Exception & Answer of Rio Grande Railroad Company. Filed Dec. 8th,* 1885.

U. S. Circuit Court for the 5th Circuit and Eastern District of La.

THE RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

Now comes into court the Rio Grande Railroad Company, ordered to show cause, on the motion of P. S. Wiltz, Jr., dative testamentary executor of the succession of A. J. Gomila, why the effects and property described in the motion should not be delivered to the said executor, and for cause shows and pleads as exception and demurrer—

1st. That if the said executor has any cause of action or complaint he cannot present the same and have the relief prayed for by a motion and order to show cause, but should proceed by a regular action.

2d. That the seizure and sale made by the company cannot be interrupted and stayed and enjoined or presented in the man-
28 ner attempted by the motioner; that his proceeding should be by injunction on the equity side of the court.

3d. That the motion presents questions of fact and law which cannot be tried by the judges of the court without a jury, and this appearer claims a trial by jury in the ordinary way.

4. The motion presents no cause of complaint nor of action.

Wherefore the Rio Grande Railroad Company prays that the motion be refused; that it be dispensed from making answer thereto, but should the court rule against it & dismiss this demurrer & exception the company prays for leave to answer over, and for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for R. G. R. R. Co.

Answer to the Motion of P. S. Wiltz, Jr., Executor.

THE RIO GRANDE RAILROAD COMPANY
vs.
A. J. GOMILA & CO. } No. 10628.

29 To the United States circuit court for the 5th circuit and eastern district of Louisiana:

Should the foregoing exceptions and demurrer be overruled, and not otherwise, and defendant forced to answer these?

The defendant in rule, The Rio Grande Railroad Company, now and at all times reserving all manner of benefit and advantage of the demurrer and exceptions filed by them and overruled by the court, now answer the rule of the said P. S. Wiltz, Jr., dative testamentary executor of the succession of A. J. Gomila, calling upon it, to show cause why the property described in the rule should not be delivered to said executor, answers and says: They deny all the allegations in the rule except those hereinafter specially admitted. They answer and say—

1st. That on the 5th day of January, 1885, it recovered a judgment against Gomilla & Co. and Anthony J. Gomilla and Larned Torrey for $26,731.97 and interest thereon, at 5 % per annum,
30 from 1st January, 1884, until paid, and costs, rendered by this court in the suit entitled The Rio Grande Railroad Company *vs.* Gomila & Co., No. 10628.

That on the 22d day of Jan., 1885, it issued an execution of said judgment, and by virtue thereof the marshal seized and advertised for sale a certain claim and judgment in favor of Gomila & Co. against Culliford & Clarke and others, more fully and particularly described in the advertisement hereto annexed and made part of this answer and marked Exhibit No. 1.

And the company seized and advertised for sale certain claims and judgments in favor of Gomilla & Co. and against John T. Milliken and Kehlor Bros., more fully and particularly described.

EXHIBIT No. 1.

By United States marshal.

United States Marshal's Sale.

In the United States Circuit Court for the Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

By virtue of a writ of *fi. fa.* to me directed in the above-
31 entitled suit, I will proceed to sell to the highest bidder, on Wednesday, the 16th day of September, 1885, at 12 o'clock m.,

at the main entrance to the custom-house, on Canal street, in New Orleans, the following-described property, viz:

The claim made by Gomila & Co. against Culliford & Clarke, in suit No. 10965 of the district court of the United States for the eastern district of Louisiana, and the judgment rendered in said suit against Culliford & Clarke and others for $9,360.97 and interest and costs, which judgment was appealed to the circuit court of the United States for the fifth circuit and eastern district of Louisiana. On the appeal the circuit court rendered judgment against Culliford & Clarke and others on the 19th February, 1885, for $23,993.76, with 5 per cent. interest from 30th June, 1883, till paid, and costs. From this judgment Culliford & Clarke and others appealed to the Supreme Court of the United States, and the appeal is there pending.

The claim of Gomila & Co. against Culliford & Clarke and others is for $24,559.76, with interest, at 5 per cent. per annum, from
32 July 9, 1883, until paid, and costs, and is fully set forth in the libel filed in the suit of Gomila & Co. *vs.* Culliford & Clarke, No. 10965 of the United States district court for the eastern district of Louisiana.

Seized in the above suit.

Terms cash.

United States marshal's office, New Orleans, 29th day of August, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

EXHIBIT No. 2.

By United States marshal.

United States Marshal's Sale.

In the United States Circuit Court for the Eastern District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

By writ of *alias fi. fa.* to me directed in the above-entitled suit, I will proceed to sell to the highest bidder, on Monday, the twenty-first day of September, 1885, at 12 o'clock m., at the main entrance of the custom-house, on Canal street, in New Orleans, the following-described property, viz:

33 1. The judgment rendered on the 27th day June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against John T. Milliken for $6,200, with interest thereon, at the rate of 8 per cent. per annum, from 27th February, 1883, until paid, and costs of suit, with special lien and privilege on all of the property, credits, rights, and money attached.

2. The claim made by Gomila & Co. against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken, No. 7967 of the civil district court for the parish of Orleans. The claim is for $6,200, interest and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken, Kehlor Bros., garnishees—No. 7967 of the docket of said court—for $4,442.17, with interest, at 5 per cent. per annum, from June 8th, 1883, until paid, and costs; which judgment was rendered on 10th March, 1885, and was signed on the 23rd March, 1885.

Seized in the above suit.

Terms cash.

34 United States marshal's office, New Orleans, 9th day of September, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

EXHIBIT No. 3.

United States Marshal's Sale.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

In the United States District Court, Eastern District of Louisiana.

By virtue of two writs of *fieri facias* (an original and *alias fi. fa.*) to me directed in the above-entitled suit, I will proceed to sell, to the highest bidder, on Thursday, the fifth day of November, 1885, at 12 o'clock m., at the main entrance to the custom-house, on Canal street, in New Orleans, the following-described property, viz:

1. Under the original *fi. fa.*

The claim made by Gomila & Co. against Culliford & Clarke in suit No. 10965 of the district court of the United States for the eastern district of Louisiana and the judgment rendered in said suit against Culliford & Clarke and others for $9,360.97 and

35 interest and costs, which judgment was appealed to the circuit court of the United States for the fifth circuit and eastern district of Louisiana. On the appeal the circuit court rendered judgment against Culliford & Clarke and others, on the 19th of February, 1885, for $23,993.76, with 5 per cent. interest from 30th June, 1883, till paid, and costs.

From this judgment Culliford & Clarke and others appealed to the Supreme Court of the United States, and the appeal is there pending.

The claim of Gomila & Co. against Culliford & Clarke and others is for $24,559.76, with interest, at 5 per cent. per annum, from July 9, 1883, until paid, and costs, and is fully set forth in the libel filed

in the suit of Gomila & Co. *vs.* Culliford & Clarke, No. 10965 of the United States district court for the eastern district of Louisiana.

2. Under the *alias fi. fa.*

1. The judgment rendered on the 27th day of June, 1883, by the civil district court for the parish of Orleans, division C, in favor of Gomila & Co. and against John T. Milliken for $6,200, with
36 interest thereon, at the rate of 8 per cent. per annum, from 27th February, 1883, until paid, and costs of suit, with special lien and privileges on all the property, credits, rights, and money attached.

2. The claim made by Gomila & Co. against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken, No. 7967 of the civil district court for the parish of Orleans. The claim made is for $6,200, interest and costs; also the judgment rendered by the civil district court for the parish of Orleans, division C, against Kehlor Bros., garnishees, in the suit of Gomila & Co. *vs.* John T. Milliken—Kehlor Bros., garnishees—No. 7967 of the docket of said court, for $4,442.17, with interest, at 5 per cent. per annum, from June 8th, 1883, until paid, and costs, which judgment was rendered on 10 March, 1885, and was signed on the 23d March, 1885.

Seized in the above suit.
37 Terms cash.

United States marshal's office, New Orleans, 19th day of October, 1885.

R. B. PLEASANTS,
United States Marshal for the Eastern District of Louisiana.

In the advertisement hereto annexed and made part of this answer and marked Exhibit No. 2 respondent shows that it also seized certain real estate in the square bounded by St. Charles, St. Patrick street, Edmond or Calhoun St., and Henry Clay avenue.

That after these seizures Gomila & Co., to wit, on 27 Jan'y, 1885, took a rule on respondent to show cause why the seizure of the claim of Gomila & Co. against Culliford & Clarke should not be quashed and set aside. The rule was tried, and this court dismissed the rule and decreed that the seizure made by the Rio Grande Rail-
38 road Company of the claim and judgment against Culliford & Clark and others was a good and valid seizure, and maintained the seizure.

Respondent shows that after the seizures and pending the advertisements marked Exhibits No. 1 and No. 2, and whilst all said property was in the actual or constructive possession of the marshal of this court and under the jurisdiction of this court, being there advertised for sale as aforesaid, one of the defendants in execution, viz., Anthony J. Gomila, died, to wit, on this 8th day of September, 1885, and by reason of his death the advertised sales were stayed in order to make his representatives parties to the proceedings and the execution of the judgment.

That subsequently, to wit, on 10th October, 1885, upon a proper showing by petition, this court ordered as follows:

Let Mrs. Widow Gomila, widow in community with her deceased husband, A. J. Gomila, and natural tutrix of her minor
39 children, and *and* P. S. Wiltz, Jr., public administrator and dative testamentary executor of the last will and testament of A. J. Gomila, be, and are hereby, made parties to these proceedings, and specially for the purpose of enabling the petitioners to proceed under their writ of execution to advertise and sell the property by them seized and as prayed for, and let notice of this order be given to said parties by serving copies thereof on them.

October 10, 1885.

(Signed) DON A. PARDEE, *Judge.*

Respondent shows that on 16th October, 1885, a copy of this order was served on Mrs. Gomila, and on 15th Oct., 1885, a copy was served on P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila.

That then the properties described in Exhibits No. 1 & No. 2 were readvertised for sale, as will appear by the advertisement,
40 hereto annexed and marked Exhibit No. 3 and made a part of this answer, but the sale was not made because the said executor obtained an order staying the sale until the further order of the court.

Respondent shows that the real estate seized as aforesaid is worth $12,000; that the claim and judgment against Culliford and Clark & *al.* is worth $24,000 and the claim against Jno. T. Milliken & Kehlor Bros. is worth $5,000, as will appear by the appraisement thereof hereto annexed and made a part of this answer, which appraisement was made as required by the laws of this State.

Respondent alleges that the security and the making of his claim depends upon this court maintaining and preserving the seizures made as aforesaid and preserving the jurisdiction over the claim of respondent and the property seized as aforesaid, and, should the — grant the motion herein made, respondent will suffer
41 damage to the amount of its claim, viz., $26,731.97, twenty-six thousand seven hundred and thirty-one dollars and 97 cents, and interest thereon, at 5 % per annum, from 1st January, 1884, until paid, and costs.

Respondent annexed and makes a part of this answer—

1st. The judgment rendered in its favor against Gomila & Co.

2. The original execution, and the sureties given by the marshal, and the process verbal of his proceedings under said writ.

3. The *alias* writ of execution, and the notices given by the marshal, and the process verbal of his proceedings under said writ.

4. The rule taken by Gomila & Co. on 27 January, 1885.

5. The decision of the court on said rule.

6. The advertisements for sale, marked Exhibits No. 1, No. 2, and No. 3.

7. The petition of the Rio Grande Railroad Company making the representatives of A. J. Gomila parties, and the order of
42 the court thereon.

8th. The appraisement of the property seized and advertised.

The premises considered, respondent prays that there be judgment in its favor against the claim and prayer of P. S. Wiltz, Jr., dative testamentary — of the succession of A. J. Gomila, and for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for the Rio Grande Railroad Company.

Appraiser'- Report.

U. S. Circuit Court, District of Louisiana.

RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } No. 10628.

The undersigned, having been duly appointed and legally qualified to appraise the property seized in the above-entitled suit, have performed the duties devolving upon us as such appraisers, and we hereby value the said property at the sum of—

43 The Culliford & Clarke claim and judgment under original *fi. fa.*, as announced for sale on the 5th November, 1885, appraised at $24,000 00

The Kehlor Bros. claim & judgment under an *alias fi. fa.*, also announced for sale on 5th Nov., 1885, appraised at 5,000 00

Total $29,000 00

(Signed) DAN. A. ROSE,
Appraiser for Plaintiff.

(Signed) JNO. E. LIVAUDAIS,
Appraiser for Defendant.

UNITED STATES MARSHAL'S OFFICE,
NEW ORLEANS, *Nov. 27th*, 1885.

I certify the above to be a true copy of the appraisement on file in office U. S. marshal, E. D. La.

N. O., Nov. 27th, 1885.

(Signed) JNO. E. LIVEAUDAIS, *Deputy.*

44 Ch's Madnell, sworn, says he is the duly authorized agent and attorney-in-fact of the Rio Grande Railroad Company, whose officers are now absent from the jurisdiction of this court; that all the allegations in the foregoing answer are true, to the best of his knowledge and belief; that the real estate therein mentioned and seized is of a value exceeding ten thousand dollars and the judgments and claims therein mentioned and seized are of the value, as he believes, fixed by the appraisers who have appraised the same and whose report is annexed to this answer.

(Signed) CH'S MADNELL,
Agent Rio Grande R. R. C.

Sworn to and subscribed before me, notary, at New Orleans, La., and in faith whereof witness my hand and official seal as a qualified notary public on this Dec'b'r 7th, 1885.

[Seal of Notary.]

(Signed) ANDREW HERO, *Not. Pub.*

45 *Rule for New Trial Refused, etc.*

Extract from Minutes of December 22d, 1886.

RIO GRANDE R. R. Co. *vs.* GOMILA & Co. } 10628.

This cause came on to be heard on the motion of the plaintiffs to set aside and annul the order herein entered on the 5th day of November, 1885, and to grant a rehearing, and was argued by counsel. On consideration whereof it is ordered that said motion for a new trial be refused, and that said order overruling the exception and demurrer of the Rio Grande Railroad Co. and ordering the marshal to discontinue and withdraw the advertisement of the sale fixed for the 5th day of November, 1885, as aforesaid, and to desist from making said sale until the further order of this court, reserving to the parties all their right not herein passed upon, remain undisturbed.

46 *Exceptions Overruled.*

Extract from Minutes of December 26, 1886.

RIO GRANDE R. R. Co. *vs.* GOMILA & Co. } No. 10628.

This cause came on to be heard on the rule taken on Nov'r 11th, 1885, by P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, against the Rio Grande Railroad Co., to show cause why the effects and property described in the rule should not be delivered to mover—Breaux & Hall appearing for plaintiff in rule; Geo. L. Bright for Rio Grande Railroad Co., defendant in rule—

And, after hearing pleadings, evidence, and argument of counsel for the parties respectively, the rule was submitted.

Whereupon and upon consideration thereof it is ordered, adjudged, and decreed that said rule be made absolute, and ac-

47 cordin-ly that the effects and property described in the motion on file now in the possession and under the control of the marshal of this district be delivered to the said P. S. Wiltz, Jr., dative testementary executor of A. J. Gomila, as the officer of the probate court for the parish of Orleans, the said property to pass into his possession burdened with any liens in favor of plaintiff which may have resulted from its seizure herein, and to be *and to be* received and held by said P. S. Wiltz, Jr., the executor of Gomila's

succession, for purposes of administration, under the orders of said probate court, and that the costs of this proceeding be paid by the Rio Grande Railroad Co.

Bill of Exceptions No. 1. *Filed* 28 *Dec'b'r*, 1885.

U. S. Circuit Court, Eastern Dist. of La.

THE RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & Co. } No. 10628.

Be it remembered that on this 26 Dec., 1885, after the court
48 had dismissed the exceptions and demurrer herein filed by the Rio Grande Railroad Company to the rule of P. S. Wiltz, Jr., dative testemantary executor of A. J. Gomila, and ordered the said railroad company to answer, the said railroad company claimed a trial by jury and refused to proceed to trial without a jury; but the court refused it, this trial by jury, and ordered it to proceed to trial before the judge of the court without a jury, and to the said ruling and order of court counsel for the railroad company excepted at the time, and tender this bill of exception to the ruling and order of the court.

The court refused a trial by jury because there was but one fact which the court thought ought to be enquired into in the pending matter—that was as to the death of Gomila, and this fact being admitted in the pleadings, their [there] could be no issue of fact for a jury.

Dec. 28th, A. D. 1885.

(Sign'd) ALEX. BOARMAN, *Judge.*

49 *Bill of Exceptions No.* 2. *Filed* 28 *Dec'r*, 1885.

United States Circuit Court for the Eastern District of Louisiana, 5th Circuit.

THE RIO GRANDE RAILROAD COMP'Y
vs.
GOMILA & Co.

Be it remembered that on the trial of the rule taken by P. S. Wiltz, Jr., public administrator and dative testementary executor of A. J. Gomila, on the Rio Grande Railroad Company, which took place on Saturday, the 26th Dec'r, 1885, after the court had refused to grant the said R. R. company, defendant in rule, a trial by jury and exception to the ruling of the court had been taken, the plaintiff and defendants in said rule offered their evidence, and the court found and the parties admitted the facts to be—

1. A. J. Gomila died on the 8th September, 1885, insolvent. The property seized was inventoried in his succession. The firm of A. J. Gomila & Co. was composed of A. J. Gomila and Larned Torrey,

50 both insolvent. The real estate was fully owned by Gomila, and the interest of Gomila in the partnership was three-quarters and that of Torrey one-quarter.

2nd. On the 5 January, 1885, the Rio Grande Railroad Company recovered a judgment against Gomila & Co. and Anthony Gomila and Larned Torrey for $26,731.99 and interest thereon, at 5% per annum, from 1st Jan., 1884, until paid, and costs, rendered by this court in the suit entitled The Rio Grande Railroad Company *vs.* Gomila & Co., No. 10628.

On the 22nd Jan'y, 1885, the railroad company issued an execution of said judgment, and by virtue thereof and before the death of A. J. Gomila the marshal of this court seized and advertised for sale a certain claim and judgment in favor of Gomila & Co. against Culliford & Clarke and others, more fully described in the advertisement annexed to the answer of the railroad company, marked Exhibit No. 1.

51 And the company also seized and advertised for sale certain claims and judgments in favor of Gomila & Co. and against John T. Milliken and Kehlor Bros., more fully and particularly described in the advertisement annexed to the answer of the railroad company, marked Exhibit No. 2.

And the railroad company seized certain real estate in the square bounded by St. Charles St., Edmund or Calhoun streets, and Henry Clay avenue, belonging to A. J. Gomila. All these seizures were made before the death of A. J. Gomila.

After these seizures were made Gomila & Co. took a rule on the railroad company to show cause why the seizures of the claim of Gomila & Co. against Culliford and Clarke should not be quashed and set aside. The rule was tried, and this court dismissed the rule and decreed that the seizures made by the Rio Grande Rail-

52 road Company as aforesaid were good and valid seizures, and maintained them.

After the seizures and pending the advertisements marked Exhibits No-. 1 and 2, and which said property was in the possession of the marshal of this court, the said A. J. Gomila died, viz., on 8th Sept., 1885, and by reason of his death the advertized sales were stayed in order to make his representatives parties to the proceedings of the execution of the judgment. They were made parties by an order made on the 10th October, 1885, which is as follows:

"Let Mrs. Widow Gomila, widow in community with her deceased husband, A. J. Gomila, and natural tutrix of her minor children, and P. S. Wiltz, public administrator and dative testamentary executor of the last will and testament of A. J. Gomila, be, and are hereby, made parties to these proceedings, and specially for the purpose of enabling the petitioners to proceed under their

53 writ of execution to advertize and sell the property by them seized and as prayed for, and let notice of this order be given to said parties by serving copies thereof on them.

October 10th, 1855.

(Signed) DON A. PARDEE, *Judge.*"

On the 16th Oct., 1885, a copy of this order was served on Mrs. Gomila, and on the 15th Oct., 1885, a copy was served on P. S. Wiltz, Jr.

Then the properties described in Exhibits No-. 1 & 2 were readvertised for sale. The judgment against Culliford & Clarke was appraised at $24,000, and the claim against John T. Milliken and Kehlor Bros. at $5,000.

Upon these facts the counsel for the Rio Grande Railroad Company asked the court to find in favor of the railroad company and against the claim and prayer of the said P. S. Wiltz, Jr., dative testemantary executor of A. J. Gomila; but the court re-
54 fused so to find and found in favor of said Wiltz, executor, and rendered judgment in his favor. To the finding and ruling of the court counsel for the railroad excepted at the time, and now tenders this bill of exception for the signature of the court, after submitting it to counsel for the said P. S. Wiltz, Jr., tes'ty executor, and the bill of exception is now signed as sealed.

Approved.

(Signed) BREAUX & HALL, *For Ex'r.*

The court, on admission of parties, found the facts as stated in the bill, but the court did not think any of the facts admitted should have been heard or considered, except the fact that the defendant, Gomila, died before the sale day. The court is of the opinion that, the death of Gomila being made known to the court, the sale should not be made and the property then under seizure by the marshal should be turned over to the administrator.

Dec. 28th, A. D. 1885.

(Signed) ALECK BOARMAN, *Judge.*

55 *Judgment.*

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. November Term, 1885.

NEW ORLEANS, SATURDAY, *December 26th*, 1885.

Court met pursuant to adjournment.

Present: Hon. Aleck Boarman, district judge.

RIO GRANDE R. R. Co. *vs.* GOMILA & Co. } # 10628.

This cause came on to be heard on the rule taken on Nov. 11th, 1885, by P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, against the Rio Grande Railroad Co. to show cause why the effects and property described in the rule should not — delivered to mover—

Breaux & Hall appearing for plaintiff in rule; Geo. L. Bright for Rio Grande Railroad Co., defendant in rule—

And, after hearing pleadings, evidence, and arguments of counsel for the parties respectively, the rule was submitted.

Whereupon, and upon consideration thereof, it is ordered, adjudged, and decreed that said rule be made absolute, and ac-
56 cordingly that the effects and property described in the motion on file now in the possession and under the control of the marshal of this district be delivered to the said P. S. Wiltz, Jr., dative testementary executor of A. J. Gomila, as the officer of the probate court for the parish of Orleans, the said property to pass into his possession burdened with any liens in favor of plaintiff which may have resulted from its seizure herein, and to be received and held by said P. S. Wiltz, Jr., the executor of Gomila's succession, for purposes of administration under the orders of said probate court, and that the costs of this proceeding be paid by the Rio Grande Railroad Co.

Judgment rendered Dec. 26, 1885.

Judgment signed Jan'y 2, 1886.

(Signed) ALECK BOARMAN, *Judge.*

57 *Petition for Writ of Error. Filed Jan'y 6th,* 1886.

THE RIO GRANDE RAILROAD COMPANY
vs.
GOMILA & CO. } # 10628.

To the United States circuit court for the 5th circuit and eastern dist. of Louisiana:

The petition of the Rio Grande Railroad Company, the plaintiffs in the above-entitled suits, shows—

That on the 5th Nov., 1885, judgment was rendered against them and in favor of P. S. Wiltz, Jr., dative test'y executor of A. J. Gomila, whereby "it is ordered that the exception and demurrer of said Rio Grande Railroad Company be overruled, and that the marshal discontinue and withdraw the advertisement of sale herein fixed for this day and desist from making said sale until the further order of this court, reserving to the parties all their rights not herein passed upon."

That on the 22d day of Dec., 1885, judgment was rendered ordering that the motion for new trial be refused, and that said
58 order overruling the exception and demurrer of the Rio Grande Railroad Company and ordering the marshal to discontinue and withdraw the advertisement of the sale fixed for the 5th day of November, 1885, aforesaid, and to desist from making said sale until the further order of this court, reserving to the parties all their right not herein passed upon, remain undisturbed.

That on the 26th Dec., 1885, judgment was rendered as follows:

It is ordered, adjudged, and decreed that said rule be made absolute, and accordingly that the effects and property described in the motion on file, now in the possession and under the control of the marshal of this district, be delivered to the said P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, as the officer of the probate court for the parish of Orleans, the said property to pass

into his possession burdened with any liens in favor of plain-
59 tiff which may have resulted from its seizure herein, and to be received and held by said P. S. Wiltz, Jr., the executor of Gomila's succession, for purposes of administration under the orders of said probate court, and that the costs of this proceeding be paid by the Rio Grande Railroad Co., which said judgment was signed Jan'y 2d, 1885.

And, *on* further, that your petitioners are aggrieved by said final judgments, and they believe there is error therein to their prejudice. They pray that they be granted a writ of error from said judgments, to operate as a supersideas, returnable to the Supreme Court of the United States on the second Monday of October, 1886, and, as the law directs, upon their giving bond and surety in an amount to be fixed by the court and according to law; that P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila and the defendant in the writ of error, be cited to answer the writ according to law.

60 And your petitioners pray for general relief.

(Signed) GEO. L. BRIGHT,
Counsel for Pet'rs.

Order.

A writ of error, to operate as a supercedias, is allowed herein as prayed for, returnable to the Supreme Court of the United States on the second Monday of Oct., 1886, upon the plaintiffs in error furnishing bond, with good and solvent surety, in the sum of five hundred dollars, conditioned as the law directs.

New Orleans, Jan. 6, 1886.

(Signed) ALECK BOARMAN, *Judge.*

61 Know all men by these presents that we, Rio Grande Railroad Company, as principal, Charles Madnell, as surety, are held and firmly bound unto P. S. Wiltz, Jr., dative testementary executor of A. J. Gomila, and unto all persons in interest, in the full and just sum of five hundred dollars, to be paid to the said P. S. Wiltz, Jr., dative testementary executor of A. J. Gomila, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit — of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein The Rio Grande Railroad Company are plaintiff- and Gomila & Co. are defendants, No. 10628, and in which final judgment was rendered against them and in favor of P. S. Wiltz, Jr., dat. test'y executor of A. J. Gomila, as set forth in the petition for a writ of error, & the said Rio Grande Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, citing

and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Rio Grande Railroad Company shall prosecute this writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) RIO GRANDE RAILROAD CO.,
By their counsel, G. L. BRIGHT. [L. S.]
(Signed) CHAS. MADNELL. [L. S.]

Sealed and delivered in the presence of—
(Signed) H. J. CARTER,
235 Magazine St., New Orleans, La.

62 [Endorsed:] No. 10628. United States circuit court, eastern district of Louisiana. Rio Grande Railroad Company *vs.* Gomila & Co. Bond for writ of error. Filed Jan'y 8, 1886. (Signed) E. R. Hunt, clerk, by H. J. Carter, deputy.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } *ss:*

Personally appeared Charles Madnell, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, and is worth the full sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) CHAS. MADNELL.

Subscribed and sworn — before me this 8 day of Jan'y, 1886.
[Seal of Court.]
(Signed) H. J. CARTER,
Dep'ty Clerk U. S. Circuit Court,
Eastern District of Louisiana.

Approved Jan'y 9th, 1886.
(Signed) ALECK BOARMAN, *Judge.*

63 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 61 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the rule of P. S.

Wiltz, dative testamentary executor, &c., filed Nov. 5, 1885, in the case of Rio Grande Railroad Co. *vs.* Gomila & Co., No. 10628 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 17 day of July, A. D. 1886.

{Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.}

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 17th day of July, A. D. 1886.

EDWARD C. BILLINGS, *Judge.*

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Rio Grande Railroad Company and P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, the nature of which is more particularly set forth in the petition for writ of error herein filed by the Rio Grande Railroad Company, a manifest error hath happened, to the great damage of the said Rio Grande Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court of the United States, this 8 day of January, in the year of our Lord one thousand eight hundred and eighty-six.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

65 [Endorsed:] United States circuit court. No. 10628. Rio Grande Railroad Company *versus* Gomila & Co. Writ of error. Filed Jan'y 8th, 1886. E. R. Hunt, clerk.

66 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the Rio Grande Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Rio Grande Railroad Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9 day of January, in the year of our Lord one thousand eight hundred and eighty-six.

ALECK BOARMAN, *Judge.*

67 [Endorsed:] R. United States circuit court, eastern district of Louisiana. No. 10628. Rio Grande Railroad Company, plaintiff in error, *vs.* P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, defendant in error. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed Jan'y 12, 1886. E. R. Hunt, clerk.

Marshal's Return.

Received Jan. 9, 1886, by the U. S. marshal, and on the 11th day of January, 1886, I served a true duplicate of this original citation on P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila, by handing the same to him in person & leaving the same in his hands in the city of New Orleans. Returned Jan'y 12, 1886.

R. B. PLEASANTS,
U. S. Marshal,
By JOHN BAKER,
Dep'ty U. S. Marshal.

John Baker, being duly sworn, doth depose and say that he is a duly qualified deputy of R. B. Pleasants, U. S. marshal for the east-

ern district of Louisiana, and that the service as above stated was by him made as set forth in above return.

JOHN BAKER.

Sworn to and subscribed before me this 13th day of January, 1886.

H. J. CARTER,
Deputy Clerk U. S. Circuit Court, Eastern Dist. of La.

68 Supreme Court of the United States.

Assignment of Errors.

THE RIO GRANDE RAILROAD COMPANY, Plaintiffs in Error,
vs.
A. J. GOMILA & Co.—P. S. WILTZ, Public Administrator and Dative Testamentary Executor of A. J. Gomila—Defendant in Error.

Error to the circuit court of the United States for the 5th circuit and eastern district of Louisiana.

The Rio Grande Railroad Company, plaintiffs in error, make this their assignment of errors:

The circuit court erred in holding—

1°. That the defendant in error could proceed by rule instead of by an original action.

2. That the defendant in error can proceed on the law side of the court instead of on the equity side.

69 3. That the plaintiffs in error were not entitled to a trial by jury.

4. That the marshal should not proceed to sell the property of A. J. Gomila, which he had seized and advertised for sale before the death of Gomila, and in ordering the marshal to deliver to P. S. Wiltz, public administrator & dative testamentary executor, as the officer of the probate court for the parish of Orleans, the said property, seized for the purposes of administration under the orders of the probate court.

GEO. L. BRIGHT,
Counsel for Rio Grande Railroad Company, Plaintiffs in Error.

[Stamped:] Geo. L. Bright, att'y & counsellor-at-law, 17 Commercial Place, New Orleans.

70 [Endorsed:] Supreme Court U. S. 1886, Oct'r term. No. 1062. The Rio Grande Railroad Company, pl'ff in error, *vs.* P. S. Wiltz, Jr., dative testamentary ex'c'r, &c. Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Oct. 8, 1886. James H. McKenney, clerk.

Endorsed on cover: E. Louisiana C. C. U. S. No. 387. The Rio Grande Railroad Company, plaintiff in error, *vs.* P. S. Wiltz, Jr., dative testamentary executor of A. J. Gomila. Filed October 2, 1886.

Office Supreme Court U. S.
FILED.
NOV 11 1889
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES

No. 387.

THE RIO GRANDE RAILROAD COMPANY,
PLAINTIFFS IN ERROR,

versus

A. J. GOMILA & CO.

P. S. WILTZ, PUBLIC ADMINISTRATOR AND DATIVE TESTAMENTARY EXECUTOR OF A. J. GOMILA,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the 5th Circuit and Eastern District of Louisiana.

BRIEF FOR THE PLAINTIFFS IN ERROR.

GEO. L. BRIGHT.

Nov., 1889.

T. H. Thomason, Printer, New Orleans.

Court for the Fifth Circuit and Eastern District of Louisiana, issued execution and seized a claim and judgment in favor of Gomila & Co. against Culliford & Clark, pending on appeal from the Circuit Court to the United States Supreme Court, and seized also a claim and judgment in favor of Gomila & Co. against Milliken and Kehlor Bros., pending on appeal to the Supreme Court of the State of Louisiana, and also, a piece of real estate situated in the City of New Orleans. The property seized except the real estate was advertised by the Marshal for sale. Pending the advertisement, and before the day of sale, Gomila, of the firm of Gomila & Co., died; the sale was not made on the day advertised because of the death of Gomila. The representatives of Gomila were made parties to the proceedings under the execution. The sale was readvertised.

Before the day of sale, see Bill of Exceptions No. 2, pp. 20-22, P. S. Wiltz, Public Administrator, and as such Dative Testamentary Executor of A. J. Gomila, ruled the Rio Grande Railroad Company to show cause why the Marshal should not discontinue and withdraw the advertisement of sale, and desist from making the sale as advertised, p. 1.

To this rule, the Railroad Company pleaded, p. 2:

1st. That Wiltz, executor, cannot proceed by rule, but must proceed by an original action, by bill in equity, on the equity side of the Court.

2d. That if he can proceed by rule, and the issue

be within the jurisdiction of the Law Side of the Court, then Railroad Company is entitled to a trial by jury.

When the exception was overruled the Railroad Company answered, and contended that the property seized, was seized and advertised for sale before the death of Gomila, was in the custody of the Court, and within its jurisdiction at the time of his death, and should not be transferred to the Probate Court of the State for administration.

Upon a hearing the Circuit Court ordered that the exception be overruled, and the Marshal discontinue and withdraw the advertisement of sale herein fixed for this day, and desist from making said sale until further order of the Court, reserving to the parties all their rights not herein passed upon, p. 8.

This order was made to postpone the sale which was fixed for the same day as the rule. Subsequently on another rule, p. 10, being taken by the executor to show cause why said effects and property should not be delivered to him, burdened with any liens in favor of plaintiff which may have resulted from its seizures herein, and to be received and held by said executor for the purpose of administration under the orders of the Probate Court, p. 10, and the Circuit Court, pp. 22, 23, ordered, adjudged and decreed, that the rule be made absolute and accordingly that the effects and property described in the motion on file now in the possession and under the control of the Marshal of this District, be delivered to the said P. S. Wiltz, Jr., Dative Testamentary Executor

of A. J. Gomila, as the officer of the Probate Court for the Parish of Orleans, the said property to pass into his possession burdened with any liens in favor of plaintiff which may have resulted from its seizure herein, and to be received and held by said P. S. Wiltz, Jr., the executor of Gomila's Succession, for purposes of administration under the orders of said Probate Court, and that the costs of this proceeding be paid by the Rio Grande Railroad Company.

WE ASSIGN AS ERROR.

The Circuit Court erred in transferring the property seized during the lifetime of Gomila to the State Probate Court, and in not maintaining and preserving its jurisdiction on the property, and in preventing the Marshal from selling the same by virtue of the execution.

ARGUMENT.

The Court erred in transferring the property to the Probate Court of the State.

The jurisdiction of the United States Courts is fixed by the Constitution of the United States. Section 2 of Art. 111 provides: "The judicial power shall extend to all cases, in Law and Equity, between citizens of different States."

"The jurisdiction of a court is not exhausted by the rendition of judgment, but continues until that judgment is satisfied. Process subsequent to judgment is as essential to jurisdiction as that which is antecedent to judgment; and, accordingly, the power of the

Courts to enforce a judgment against persons and property, by any process which the Acts of Congress empower them to use, cannot be impaired by injunctions issued from State Courts of concurrent jurisdiction, in litigation there commenced subsequent to the exercise of jurisdiction on the part of the National Courts." *1 Abbott's U. S. Practice, marginal p. 226. Riggs vs. Johnson County, 6 Wall. 166.* In Riggs vs. Johnson County, Riggs applied for a mandamus to compel the defendants, as the supervisors of the County, to assess a tax upon the taxable property of the County to satisfy the judgment described in the transcript. They appeared and alleged that they had been enjoined by the State Court not to assess the tax. The Court said, p. 187, process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution. The Court made the mandamus peremptory, and disregarded the attempt of the State Court to contest the execution of a judgment rendered by the United States Court.

We cite this case to show that to interfere with the execution of a judgment rendered by the United States Court, is to interfere with the jurisdiction of that Court.

The counsel for the motioner contends that the Probate Court of the State alone has the right to sell the property of Gomila, and this because the law of

Louisiana is, that a Probate Court alone can order the sale of succession property, and distribute the proceeds.

If Louisiana can divest the United States Court of jurisdiction in matters of succession, she may divest it in any other matters. She can by creating special jurisdiction over particular class of cases, and to that extent exclude the jurisdiction of the United States Courts. She can control and destroy the jurisdiction of the United States Courts. Suppose she should require all actions of partitions to be brought in the State Court, would the judicial power of the Circuit Court be controlled by the State? If not, then the law of Louisiana which requires that the property of a deceased person be administered by the Probate Court, cannot divest the United States Courts of its acquired jurisdiction before the death of the party—if it could, this would make the United States Court subordinate to the State Court.

It cannot be so—the property of Gomila was seized and advertised before his death—the Court has jurisdiction of it. The motion now is made to stay the sale, and let the State Court administer the property, but that the Marshal hold on nevertheless to the seizure, thus presenting the ridiculous and absurd spectacle of the State and the United States Courts exercising jurisdiction at one and the same time over the same thing.

The rule is, that whenever property has been seized under judicial process, the property is to be considered as in the custody of the Court, within its jurisdiction;

and no other Court has a right to interfere with that possession, unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, or some superior jurisdiction in the premises. *1 Abbott's U. S. Pr., Sec. 46; Wallace vs. McConnell, 13 How. 151; Riggs vs. Johnson County, 6 Wall. 514; Bell vs. Ohio Life and Trust Co., 1 Biss. 260; Devisser vs. Blackstone, 6 Blatchf. 235; Fox vs. Hempfield R. R. Co. 2 Abb. U. S. 151; United States vs. The Reindeer, 2 Cliff. 57; The Skylark, 2 Biss. 251; Buck vs. Colbath, 3 Wall. 334.*

In *Collier vs. Stanbrough, 6 How. 14*, the question relative to probate matters for the first time came before the Supreme Court. In that case the judgment was obtained against the administrator *after* the death of the defendant, and the seizure of the property was made *after* the property was under administration in the Probate Court, *after* the Probate Court had it under its jurisdiction. In the case before the Court, the judgment was rendered and the seizure was made and the property was advertised during the lifetime of the defendant. At his death and till now, this Court was vested with jurisdiction of the property, and the State Court has never been vested with jurisdiction, for the two Courts cannot be vested with jurisdiction at the same time.

In that case a judgment was obtained against David Stanbrough, as curator of the succession of Jesse Harper, deceased, by the Farmers' Bank of Virginia; an execution issued; three mortgage notes were seized

and sold to Lewis A. Collier by the Marshal. The notes were not appraised.

Josiah Stanbrough, claiming to be the owner of the notes acquired by him from the curator, took out an order of seizure and sale on the notes. Collier, who had purchased them, enjoined him. Josiah Stanbrough answered, averring that the property of the succession of Harper, whilst administered in the Probate Court of Louisiana, could not be legally subjected to any writ of execution from the Federal Courts, p. 16. The Court decided the cause upon want of appraisement of the notes, and forebore touching the delicate qestion as to whether the United States Court had the right to seize and sell property *after* the State Probate Court had it under its administration, and was vested with jurisdiction.

The "delicate question" was the fact the State Court had the property under its jurisdiction before the judgment was rendered—before the seizure was made.

In *Dupuy vs. Bemiss, 2 La. An. 510,* it appeared that Claudius Gibson died; Davis was appointed administrator of his succession, and took possession of his effects. Before Claudius Gibson died, Tobias Gibson, of Kentucky, had obtained in the State Court a judgment for $33,100 against him and seized his property, but had not advertised it for sale.

To avoid the State law which would send him to the succession for his debt secured by the seizure, Tobias Gibson filed his petition in the Circuit Court of the United States for the 5th Circuit and District of Lou-

isiana, in which he alleged the recovery of this judgment, and that under an execution issued on said judgment, a seizure had been made of certain slaves and movables, described in the return of the execution, which was made after the death of Claudius Gibson, without selling any portion of the property seized. It was alleged that Davis, curator of the succession of Claudius Gibson, had taken charge of the estate of the deceased, and particularly of the property mentioned in the return of the execution. Executory process is asked against the property seized as aforesaid for the payment and satisfaction of the judgment, and the petition concludes with a prayer for general relief. An order for the seizure and sale of the property described was made by the Judge, which was executed by the seizure and advertisement for sale of the slaves by the Marshal.

Davis, administrator, enjoined the order, on the ground of *the pending administration of the succession*, the consequent injury to other creditors, whose rights to be paid will be sacrificed by the appropriation of the property seized to the exclusive payment of Tobias Gibson's claim.

The Court said:

"1. The most important question to be determined relates to the jurisdiction of the court under which the sale was made. The case arising before the present organization of the Courts of this State, the jurisdiction of the Court of Probate, referred to, is that which existed previous to the adoption of the present Con-

stitution. The proposition is, that the Circuit Court of the United States had no jurisdiction to order the sale of the property of a succession while under administration and under the superintendence and authority of the Probate Court. This principle is not only maintained in argument, with evident conviction on the part of the counsel, but has had, to a certain extent, the support of authority. If it be true, it is most important in its operation on the judicial power of the Courts of the United States, as well as on that of the States, and presents one of the most serious questions which a court can be called upon to determine.

"The Circuit Courts of the United States have cognizance, in concurrence with the Courts of the States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds $500, between the parties designated by law under the Constitution of the United States. The latter, in creating the judicial power, intended it to extend to all cases in law and equity whenever it had jurisdiction over the persons. And it seems to conflict with this power that a State, by creating a special jurisdiction over particular classes of cases, should to that extent exclude the jurisdiction of the Courts of the United States. Let us suppose that actions of partition were required to be brought before a particular court, and that no other court could, by a State law, take jurisdiction of them; would the judicial power vested in the Circuit Courts of the United States be affected by

such a limitation of jurisdiction? The most obvious impression produced by a consideration of the Constitution of the United States and the laws made under it for the organization of the judicial power, certainly is, that whenever the Courts have jurisdiction by reason of the person, their jurisdiction (*ratione materiæ*) extends to all cases in law and equity, within the pecuniary amount by which it is limited."

In that case the Court considered all the arguments used in this cause by the plaintiff in rule, and decided that the fact of a succession being under administration in a Court of Probate, as constituted under the judicial organization existing anterior to the Constitution of 1845, could not deprive a Circuit Court of the United States of jurisdiction, and it held that property seized before the death of the defendant in execution, could be sold by the Marshal, and should not be transferred to the jurisdiction of the State Court to be administered and distributed in the matter of the succession.

The learned counsel for the motioner replied to this decision by saying, that the claim of Tobias Gibson was a mortgage claim, and therefore the United States Court had authority to foreclose the mortgage. To us, it is immaterial whether it was or not, for we think it is the fact that the Court was first seized of jurisdiction that is to decide the question, not the nature of the debt.

But the claim of Tobias Gibson was not one secured by mortgage. He never had a mortgage. He claimed

no right by virtue of any mortgage. He claimed the jurisdiction of this Court, because he was a citizen of Kentucky, and the right to sell without interference from the State Court, because he had made the seizure before the death of the defendant. We have examined the transcript in the Supreme Court of the State, No. 382, Dupuy vs. Bemiss, and the fact is as we have stated it. We have examined the record in the Clerk's Office of this Court, No. 871, Tobias Gibson vs. Davis, curator, and the fact is as we have stated it. In that case Tobias Gibson obtained an order to sell, upon the fact that he had recovered a judgment and made a seizure, and the defendant had died before the sale. The Court granted him the order, and the State Supreme Court, in Dupuy vs. Bemiss, 2 La. An. 510, decided that the Circuit Court of the United States was vested with jurisdiction, and rightfully proceeded with the sale. Eustis, C. J., in his statement of facts, does not say that Tobias Gibson claimed by virtue of a mortgage. Gibson asked for *executory process*, and our learned opponent thinks he must have had a mortgage. Not so. Executory process, which is an order to sell, issues whenever the party has a privilege. Code of Practice of La., 736–737. Gibson claimed the right by virtue of his judgment and seizure. Whenever, in that decision, the word mortgage is used by the Chief Justice, he does not mean to apply it to the claim of Tobias Gibson, but to that of Hunt. A careful reading of the decision shows it.

In *Erwin vs. Lowry, 7 How. p. 181,* this Court said, speaking of Dupuy vs. Bemiss:

"We accord to this adjudication our decided approbation."

In *Hyde vs. Stone, 20 How. p. 175,* the Court said: But this Court has repeatedly decided that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the State which prescribe the modes of redress in their Courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the Courts of the United States, and the form of proceedings in these Courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the Courts of the United States are bound to proceed to judgment and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam vs. Broadnax, 14 Pet. 67; Union Bank vs. Jolly, Admr., 18 How. 503.*

In *Freeman vs. Howe et al., 24 How.* 454, the principle established is, where the Federal Court has first acquired jurisdiction, the State Court cannot interfere with it, and the Court said, "as it respects the effect to be given to the processes of the Courts, whether State or Federal, the subject was so fully and satisfactorily examined in the case of Taylor et al.

vs. Carryl, 20 How. 583, the last of the series on the subject, we need only refer to it."

Our opponent relies on the case of *Yonley vs. Lavender, 21 Wall. p. 277.* In that case it was held where a statute of a State places the whole estate, real and personal, of a decedent within the custody of the Probate Court of the County, so that the assets may be fairly and equally distributed among creditors, without distinction, as to whether resident or non-resident, a non-resident creditor may get a judgment in a Federal Court against the resident executor or administrator, and come in on the estate according to the law of the State, for such payment as that law, marshalling the rights of creditors, awards to debtors of his class. But he cannot, because he has obtained a judgment in the Federal Court, issue execution and take precedence of other creditors who have no right to sue in the Federal Courts; and if he do issue execution and sell lands, the sale is void.

The case is not applicable, no property had been seized by the Federal Court before the death of the defendant in execution. The seizure was made after the State Probate Court had taken possession of the property, and had acquired jurisdiction. The suit was instituted against the administrator and judgment was obtained against him, and on execution issued against him, property under administration was seized and sold. The property was then under the jurisdiction of the State Court, and the Federal

Court was taking from the State Court the property and the jurisdiction.

In this case the judgment was rendered against Gomila in his lifetime, the property was seized and advertised for sale before his death; and the attempt is now made to take the property from the Federal Court, and to deprive that Court of its jurisdiction, and to deliver the property to an executor, and divest the jurisdiction of the Federal Court to vest it in the State Court.

We respectfully submit we have shown that the Circuit Court was not divested of jurisdiction of property seized under an execution, and advertised for sale before the death of Gomila, by his death, and that the Marshal should proceed and sell the property.

Respectfully submitted,

GEO. L. BRIGHT.

Nov., 1889.

FILED.
NOV 12 1889
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 113.

THE RIO GRANDE RAILROAD CO., PLANTIFF IN ERROR,

versus

P. S. WILTZ, DATIVE TESTAMENTARY EXECUTOR ESTATE OF A. J. GOMILA, ET. ALS., DEFENDANT IN ERROR.

STATEMENT AND BRIEF ON BEHALF OF DEFENDANT IN ERROR.

GUS. A. BREAUX,
of Counsel for Executor Estate J. A. Gomila.

New Orleans, October, 1889.

A. W. Hyatt, Printer and Stationer, 73 Camp st., N. O.—47426

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 113.

THE RIO GRANDE RAILROAD CO., PLANTIFF IN ERROR,

versus

P. S. WILTZ, DATIVE TESTAMENTARY EXECUTOR ESTATE OF A. J. GOMILA, ET. ALS., DEFENDANT IN ERROR.

STATEMENT AND BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Judgment was obtained by the Rio Grande Railroad Co. against Gomila & Co., in the United States Circuit Court.

Thereon execution issued, and certain real estate and a claim, then pending in State court, were seized. After seizure, but before sale, Gomila died.

His succession was regularly opened, and the State probate court under the law became seized of his estate for administration and distribution.

The proceedings under execution in the circuit court, admittedly, were stayed by the death of Gomila; as under no circumstances could plaintiff proceed, there being no defendant in court, until, in any event, a legal representative of the estate of Gomila could be made a party.

When the testamentary executor was qualified he applied to the circuit court in a summary proceeding for an order on the

marshal to turn over all property seized by him under the *fieri facias* against Gomila, to the executor, for administration and distribution.

The estate of Gomila is really the sole party having an interest in any of the property seized. This order, the court granted Dec. 26, 1885. See transcript, page 23.

From this judgment a writ of error to this honorable court was sued out, and the question for decision is: Was this judgment of December 26, 1885, legal and correct?

Other questions as to the mode of proceeding were raised in the trial court, but, as I am advised, are all abandoned by my learned opponent; so that the question stated above is the only one which the court is called to pass upon.

ARGUMENT.

It is neither denied, nor will it be, that under the laws of Louisiana, in an estate under administration, creditors can be paid only *in concurso* and on an account of distribution. Civil Code, art. 1189. Code of Practice, art. 983.

The purpose of the law obviously is to do equal justice to all creditors; which end could be obtained in no other way.

The contention of the plaintiff in error is, that inasmuch as the court which rendered the original judgment was seized of the property of the defendant by its execution, its jurisdiction cannot be defeated by sending the seized property to the court of probates for distribution, and the execution of its process arrested.

The error in the proposition, as stated and illustrated by the brief of my learned opponent, consists in treating the action of the court as an ouster of jurisdiction.

In passing upon the question this honorable court has said:

"There is no question here about the regulation of process by the State to the injury of the party suing in the federal court. The question is whether the United States court can excute judg-

ment against the estates of deceased persons, in the course of administration in the State, contrary to the declared law of the State on the subject."

The question of the execution of a judgment is not in such cases one of jurisdiction: It is placed by the laws of administration of the State upon a totally different footing from that of the jurisdiction of courts.

"The administration laws of Arkansas" pursued the court in Yonley vs. Lavender, 21 Wallace 279, 280, already quoted, "are not merely rules of pratice for the courts, but laws limiting the rights of the parties, and will be observed by the federal courts in the enforcement of individual rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State, and placed it in the hands of a trustee for the benefit of creditors and distributees."

In Williams vs. Benedict, 8 Howard 111, the court held that "the process, both mesne and final in the district and circuit courts of the United States, being conformed to those of the different States in which they have jurisdiction, depends also upon the state law, where congress has not legislated upon the subject. * * * * But if at the time of the death the fund from which each of the creditors has an equal right to claim satisfaction is insufficient to pay all equity requires that one should not be permitted by a mere lack of diligence to seize satisfaction of his whole debt at the expense of another."

In Hess vs. Reynolds, 113 U. S. 77, this court says that the federal courts will pay respect to the principle that all debts to be paid out of a deceased's estate shall be established in the court to which the law of his domicile has confided the general administration of his estates in the execution of process enforcing their judgments out of the assets.

And in Peale vs. Phipps, 14 Howard 375, Chief Justice Taney approving the decision in Wiswall vs. Sampson & Lessee, said

that "land in the hands of a receiver appointed by a State tribunal could not be sold by the marshal upon process of execution issuing out of the circut court of the United States, although the judgment upon which the process issued was a lien upon the land, and the *execution was laid before the receiver obtained actual possession of the property.*"

This court has said that there is no difference in principle on the point under consideration between the administration and insolvent laws of the State; and the reason obviously is that both are enacted to secure the just and equal distribution of estates among creditors, citing approvingly a case from Louisiana. 21 Wallace 282.

In Hijo vs. Hoffman & Co., 29 A. 19, the Supreme Court of Louisiana has drawn the difference between the effect of death and the effect of bankruptcy sharply: "Death puts an end to all judicial proceedings in the name of the deceased, and no steps can be taken until his proper legal representative is made a party in his stead. Bankruptcy vests in the assignee the right to prosecute the suits in which the bankrupt is the actor," etc., says the court.

These principles distinguish the instant from the entire line of cases cited. The equitable requirement of the State law that all distribution among the creditors of a decedent should be made by the court of probates is not an infringement of the jurisdiction of the court having settled the status of a party; but simple obedience to a State law, limiting the rights of parties, to which the federal courts will give heed in the enforcement of individual rights.

In principle it can make no difference that execution was levied before or after death, as the court said in Peale vs. Phipps, 14 How. 375; for the ascertainment of the legal rights of each creditor as against every other creditor, and the just and equitable distribution of the estate, is the purpose to be attained under

the law. It is evident that if a judgment creditor, who has been fortunate enough to lay his execution on property the day before the decease of his debtor, may proceed to sell to his payment without regard to mortuary proceedings, he disregards the laws of the state, which are more than an attempt to regulate mere process, but which fix and determine rights; and may, thus, obtain an inequitable advantage over other creditors, whose execution could have followed only the day after the death of the debtor.

In the State of Louisiana the law is beyond controversy, that no execution can issue or be maintained against a decedent's estate.

Civil Code, art. 1180; Code of Practice, 987-1953; Hennen's Digest, *verbo* Successions, VIII (e) 8, 2, 4, 8, 12.

As early as 1828 that learned judge, Martin, in the case of Legendre vs. McDonough, stated the law to be: "Where a defendant dies a judgment rendered against him must be declared executory against his heirs or representatives, because property which has ceased to be his cannot be affected by a judgment to which the owners are not made parties."

Property specially mortgaged during the lifetime of a party may, as the only exception to our law, be sold under executory process, after the decease of the owner, in a proceeding conducted against his legal representative, for the reason, as given by the court, that the mortgage was, to a certain extent, an alienation of the property, and that the contract of the parties was that the property could be proceeded against in the mode provided by the contract, under any circumstance; but the court holds that if the party waives this proceeding, and proceeds to obtain an ordinary judgment, recognizing the mortgage and privilege, and thereon issue execution, and levies on the property thereunder, and the debtor dies; the execution is by law stayed, and the property must pass into the administration, be there sold and the proceeds distributed. Hall & Lisle vs. Belden, 29 A. 118, 119.

That was a much stronger case than the present, because the

judgment was predicated upon and fully recognized a special mortgage, which, if proceeded upon for foreclosure, would have brought the case within the exception, and authorized the sale of property at the instance of the creditor; whereas in the present case the judgment is one without lien or mortgage.

That no *fi. fa.* can issue against succession property from a court of ordinary jurisdiction was held in Berlin, executor, vs. Phillips, 1 A. 173.

That was a peculiarly strong case. A slave was convicted of crime; costs to be paid by the owner; the slave belonged to the succession of Parker; execution issued and the convicted slave was seized and sold in satisfaction of judgment: the executor sued to annul the sale and recover the slave; the contention was that the execution could not issue against the property of a succession, and the sale was therefore null and void.

The court held that the receipt of the surplus by the executrix was no ratification of a proceeding absolutely null.

And the doctrine is further recognized by the State Supreme Court in Morgan and wife vs. Lalaune, 32 A. 1300.

Indeed, we make bold to assert that the series of authorities to this effect is unbroken from the earliest to the present time: and it results that the State court holds, that as the property of a succession cannot be sold under execution, but must be sold by order of the probate court, and its officer, the administrator or executor, must distribute the proceeds, it follows necessarily, that when death of the judgment debtor arrests the execution after levy, then that the judgment creditor is remitted to the court of probate for the payment and execution of his judgment.

The State Supreme Court has decided not only that execution could not issue against an estate: that if issued prior to death it abated thereafter: but it has held in Bajourin vs. Ramelli, 14 A. 783, and Lyons vs. McRae, 13 A. 440, that when property had been seized and sold and the proceeds paid into the sheriff's hand, and the defendant in execution has surrendered in

insolvency, then that such proceeds must be paid into the syndic's hand. "The judgment (ordering the surrender of the funds to the syndic) appealed from does not purport to strip the plaintiff of his rights, if any, which he may have to the proceeds in whole or in part. They are reserved to him. He will be at liberty to assert them when an account shall be presented by the syndic."

As we have seen, this supreme tribunal has said that there is no difference in principle, so far as the execution of process is concerned, between the administration and insolvent laws of a State; and the highest court in Louisiana, that death arrests all process and puts an end to all proceedings, and that no execution can under the statute issue against the property of an estate.

The logical deduction is, that the judgment of the circuit court, remitting the plaintiff in error to the probate court of Louisiana to enforce its judgment rights, whatever they may be, is correct.

We respectfully ask that the judgment of the lower court be, by your honors, affirmed with costs.

GUS. A. BREAUX,

of Counsel for Executor Estate J. A. Gomila.

New Orleans, October, 1889.

SYLLABUS OF BRIEF.

1. Administrative laws are not rules of practice for courts, but laws limiting the rights of parties, and will be observed by the federal courts in the enforcement of individual rights.
   Yonly vs. Lavender, 21 Wallace 279 et. seq.

2. Upon death and the administration of an estate, its property is withdrawn from the operation of execution laws of the State.
   Yonly vs. Lavender, 21 Wallace 279.
   Williams vs. Benedict, 8 Howard 111.
   Peale vs. Phipps, 14 Howard 375.

3. In Louisiana no execution can issue against the property of an estate or an insolvent.
   Civil Code, article 1180.
   Code Practice, 987, 1053.
   Hennen's Digest, Successions, VIII (e), 8, 2, 4, 8, 12.
   Legendre vs. McDonough, 8 N. Series (Martin), page 514.
   Hall & Lilse vs. Belden, 29 A. 118.
   Bertin, Exc., vs. Phillips, 1 A.173.
   Morgan vs. Lalaunde, 32 A. 1300.
   Bajourin vs. Ramelli, 35 A. 783.

4. As to the execution of the process of court, there is no difference in principle between the administration, and insolvent laws.
   Yonly vs. Lavender 21, Wallace 282.
   Hijo vs. Hoffman & Co., 29 A. 19.

5. Federal courts will respect the requirement of State laws that all debts to be paid out of a deceased's estate shall be established before the court to which the law of deceased's domicile has confided the general administration of the estate.
   Hess vs. Reynolds, 113 U. S. 77.
   Williams vs. Benedict, 8 Howard 111.

APPENDIX.

Art. 983, Code Practice. All debts in money which are due from successions administered by curators appointed by courts and by testamentary executors, shall be liquidated and their payment enforced by the court of probate of the place where the succession was opened.

Art. 987, Code Practice. But the creditor who has obtained such judgment, or the acknowledgment of his debt, can only obtain the payment of it concurrently with the other creditors of the succession, unless it be such a privileged claim as ought to be paid without delay.

Art. 1053, Code Practice. When a judgment shall be rendered for a sum of money against a curator to a vacant succession or absent heirs, or against a testamentary executor or other administrator, such administrator shall, within three days after the judgment has been notified to him, if he has a sufficient amount in his hands, discharge the amount of the judgment, if it be for a privileged debt, such as funeral or law charges, or other of that kind, which are to be paid in preference to all others, before the expiration of three months, within which curators of the estate and testamentary executors are bound to make payment of the debts due by the estate which they administer.

Art. 1180, Civil Code. When the time of the payment of the debts of the succession is arrived, if the curator has sufficient funds to pay all the creditors who have presented themselves or who have made themselves known, with interest and costs, he is bound to present his petition to the judge who has appointed him to be authorized to pay the creditors according to a statement which he shall annex to his petition, mentioning the names and places of residence of the creditors and the several sums due to each.

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